U.S. Department of Labor

Board of Alien Labor Certification Appeals
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NOTICE: This is an electronic bench opinion which has not been verified as official.

Date Issued: 11/09/99
Case No.: 1999 INA 179

In the Matter of:

M & I AUTOMOTIVE, INC., Employer,

on behalf of

ZBIGNIEW DROZAK, Alien.

Appearance: Michael Goldin, owner of Employer, appeared *pro se*.
Certifying Officer: R. A. Lopez, Region I.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ZBIGNIEW DROZAK ("Alien") by M & I AUTOMOTIVE, INC., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Boston, Massachusetts, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On March 27, 1997, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Auto Mechanic/Autobody Repairman" in its Auto Repair business. AF 55-56. The position was classified as an Automobile Mechanic under DOT No. 620.261-010.[3] The duties of the Job to be Performed were the following:

> Repairs of cars, removing engines, transmission, differentials, repairs and replacing pistons, rods, valves, and bearings, carburetors, blowers. generators, distributors, pumps, starters, building crankshafts, cylinder blocks, body lining, front end alignment, tune up, painting. Using all inspections instruments (micrometers, calipers, thickness gauges, etc.,) Using lathe, grinder. welding torche, polishing equipment.

AF 55, box 13. (Copied verbatim without change or correction.) The education Employer required consisted of high school completion plus two years and six months of experience in the

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]620.261-010 **AUTOMOBILE MECHANIC (automotive ser.) alternate titles: garage mechanic**. Repairs and overhauls automobiles, buses, trucks, and other automotive vehicles; Examines vehicle and discusses with customer or AUTOMOBILE-REPAIR-SERVICE ESTIMATOR (automotive ser.); AUTOMOBILE TESTER (automotive ser.); or BUS INSPECTOR (automotive ser.) nature and extent of damage or malfunction. Plans work procedure, using charts, technical manuals, and experience. Raises vehicle, using hydraulic jack or hoist, to gain access to mechanical units bolted to underside of vehicle. Removes units, such as engine, transmission, or differential, using wrenches and hoist. Disassembles unit and inspects parts for wear, using micrometers, calipers, and thickness gauges. Repairs or replaces parts, such as pistons, rods, gears, valves, and bearings, using mechanic's handtools. Overhauls or replaces carburetors, blowers, generators, distributors, starters, and pumps. Rebuilds parts, such as crankshafts and cylinder blocks, using lathes, shapers, drill presses, and welding equipment. Rewires ignition system, lights, and instrument panel. Relines and adjusts brakes, aligns front end, repairs or replaces shock absorbers, and solders leaks in radiator. Mends damaged body and fenders by hammering out or filling in dents and welding broken parts. Replaces and adjusts headlights, and installs and repairs accessories, such as radios, heaters, mirrors, and windshield wipers. May be designated according to specialty as Automobile Mechanic, Motor (automotive ser.); Bus Mechanic (automotive ser.); Differential Repairer (automotive ser.); Engine-Repair Mechanic, Bus (automotive ser.); Foreign-Car Mechanic (automotive ser.); Truck Mechanic (automotive ser.). May be designated: Compressor Mechanic, Bus (automotive ser.); Drive-Shaft-And-Steering-Post Repairer (automotive ser.); Engine-Head Repairer (automotive ser.); Motor Assembler (automotive ser.). *GOE: 05.05.09 STRENGTH: M GED: R4 M3 L3 SVP: 7 DLU: 77*

Job Offered. The Other Special Requirements were "Use of power tools such as pneumatic wrenches, lathes & grinding machines. Welding and flame-cutting equipment hoists and jacks." The work week consisted of forty hours regular time from 7:00 a.m., to 4:00 p.m., on days that were not specified plus ten hours of overtime per week. The wage rate was $16 per hour for regular time and $24 per hour for overtime. *Id.*, boxes 10-12, 14-15.[4] Although ten U. S. workers applied for the position, all were rejected. AF 27-29.

Notice of Findings. The Notice of Findings ("NO") issued on July 15, 1998, denied certification, subject to the rebuttal. AF 10-11. Citing 20 CFR §§ 656.21(b)(7), 656.21(j)(1), and 656.24(b)(2)(ii), the CO found that the Employer rejected U. S. workers for reasons that were not lawful or work related and that the Employer had failed to file a written report of the results of its recruitment efforts with the state employment security agency ("state agency"). The CO found that two U. S. workers who applied for the job, Mr. Bernier and Mr. Vail, were telephoned by Employer's owner, who left messages for them, but were not contacted in any other way concerning the position it offered. The CO directed Employer to file documentation indicating what other means of contact Employer used to contact these U.S. applicants, including but not limited to letters, receipts for certified mail, mail return receipts, and telephone records.

Rebuttal. On July 22, 1998, the Employer filed a rebuttal consisting of a letter by its owner. AF 06.. He said he tried to reach Mr. Bernier by telephone on March 12, 1998, and left his name and phone number, requested that the call be returned.. He again called on April 1, 1998, and left a similar message. On April 11, 1998, Mr. Bernier called the owner to advised that he was being hired by another employer. Employer also attempted to reach Mr. Vail on March 1, 1998, and on April 4, 1998, when he left similar messages. Although the second message was left with a woman who answered the phone, Mr. Vail did not call back. He explained that both of these calls were local, and that he had no billing record to prove that they were made on the dates asserted. Two of his employees were in the office when these calls were made, however, and the Employer attached their affidavits attesting the truth of his representations. AF 06, 08, 09.

Final Determination. Citing 20 CFR §§ 656.21(b)(7), 656.21(j)(1), and 656.24(b)(2)(ii), on August 20, 1998, the CO denied certification in the Final Determination. The CO explained that Employer's recruitment report of April 9, 1998, contradicted the rebuttal argument as to Mr. Vail, a U. S. worker who was apparently qualified for the job. The Employer stated in that report that its owner called and left a message to call him on March 1, 1998, and April 4, 1998, and that Mr. Vail submitted a resume but never came to apply for the position. AF 27-28. On rebuttal, the Employer said, Mr. Vail was contacted twice, and a message was left with a woman who answered on the second call. As Mr. Vail did not respond, the CO pointed out that the Employer

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[4]The Alien was born 1947. He was a national of Poland, and was authorized to live and work in the United states under a B-2 visa at the time of application. The Alien completed grammar and agricultural trade school, and in 1967 was awarded a diploma for completing agricultural technical college, where his Field of Study was "Mechanical/ Agricultural/Technical." From 1980 to 1991 he worked in Poland as a Mechanic/Autobody repairman: in an Auto repair shop, where his work was similar to the Job Offered.. AF 57-58. He did not disclose his employment from 1991 to the date of application.

thereafter made no further attempt to contact Mr. Vail by telephone or by Certified Mail for which he could have secured a Return Receipt. As a result, certification was denied. AF 04-05.

Appeal. In the request for review dated September 22, 1998 Employer recapitulated its evidence. It argued that the recruitment report did, in fact, document two attempts to contact Mr. Vail. The Employer further contended that it was never instructed to contact applicants by Certified Mail. Employer added, however, that on September 10, 1998, it sent Mr. Vail a letter by Certified Mail, to which he did not reply; and it reiterated that this applicant was not interested in the job because he did not respond to the contacts it described. AF 02, 04. After denying reconsideration based on **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*), the CO referred this matter to BALCA on March 26, 1999. .

DISCUSSION

Issues. The Employer was required to establish that it made a good faith effort to recruit U. S. workers for the Job Offered under the Act. **H. C. LaMarche Ent., Inc.**, 87 INA 607(Oct. 27, 1988)(*en banc*). Consequently, the issue in this appeal is whether the Employer sustained its burden of proof. The Employer's assertion that it sent a Certified Mail letter to Mr. Vail after certification was denied in the Final Determination will not be considered, as the evidence is untimely and cannot be considered in this appeal. **Huron Aviation**, 88 INA 431 (Jul. 27, 1989).

Burden of proof. As the denial of alien labor certification in this case was based on the CO's finding that the Employer failed to sustain this burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants:[5]

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of

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[5] The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334. Moreover, since the Employer applied for alien labor certification under this exception to the far reaching limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

this Act... ."

Alternative methods. It is well-established that good faith recruitment effort is required. **H. C. LaMarche Ent., Inc.,** 87 INA 607(Oct. 27, 1988). The Board has held that a reasonable effort to contact job applicants who do not respond to an employer's letters would include attempted telephone contacts. **Diana Mock**, 88 INA 255 (Apr. 9, 1990). On the other hand, in a case parallel to this application, the CO's denial of certification was affirmed where the employer failed to follow up unsuccessful telephone contact with a letter. **Jerry's Bagels,** 93 INA 461 (Jun. 13, 1994). For this reason, it is fundamental that Employer's unsuccessful attempts at telephone contact, without more, were not sufficient to establish a good faith effort to recruit. **Gilliar Pharmacy,** 92 INA 003 (June 30, 1993).[6]

Employer's evidence. The Recruitment Report, signed by Michael Goldin, Vice President of M & I Automotive, Inc. indicated that two attempts were made by telephone to contact Mr. Vail. The date column listed two such attempts, one on March 1, 1998 and one on April 4, 1998. The "specific job related reasons for rejection of U.S. worker" column indicated that a message was left both times, although ditto marks were used for the second attempt which confused the information this report presented. AF 27-28.

The report also noted that a resume was submitted by Mr. Vail, but it did not indicate the date the resume was received, and the notation regarding the receipt of the resume was is subsequent to the listing of the second telephone contact attempt, however. Although the CO's determination was based in part on the erroneous finding that Employer only attempted once to make telephone contact with Mr. Vail, this applicant appears to have responded to the second telephone message by sending in this resume. Consequently, we agree with the CO that Employer failed to establish a good faith recruitment effort where his only effort to contact Mr. Vail was in the two incomplete telephone calls, during which the Employer left messages that were unanswered, since the Employer made no additional telephone calls and did not attempt any other method of contact. This finding is more especially appropriate in that no further contacts by any

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[6]It is well established that in order to prove good-faith recruitment an employer has an obligation to try alternative means of contact. **Yaron Development Co., Inc.**, 98 INA 178 (Apr.19, 1991)(*en banc*). See also **L.G. Manufacturing, Inc.**, 90 INA 586 (Feb. 5, 1992); and see **Ceylion Shipping, Inc.**, 92 INA 322 (Aug. 30, 1993); **Roma Ornamental Iron Works, Inc.**, 92 INA 394 (Aug. 26, 1993); **Delmonico Hotel Co.**, 92 INA 324 (Jul. 20, 1993); **Gilliar Pharmacy**, 92 INA 003 (Jun. 30, 1993) (Made only unanswered phone calls; no letters mailed); **William Martin**, 92 INA 249 (Jun. 2, 1993); **Surrey Transportation, Inc.**, 92 INA 241 (Jun. 2, 1993); **Allcity Auto Repairs**, 91 INA 008 (Mar. 24, 1993) (Left only an unanswered message); **Warmington Homes**, 91 INA 237 (Mar. 22 1993); **Wells Laboratories, Inc.**, 92 INA 162 (Mar. 12, 1993); **Almond Jewelers, Inc.**, 92 INA 048 (Mar. 8, 1993); **Fragale Baking Co.**, 92 INA 064, 92 INA 065 (Feb. 23, 1993); **MVP Corp.**, 92 INA 058 (Feb. 1, 1993). Where attempts to reach an applicant by telephone are not successful, a reasonable effort requires an alternative method of contact, such as mail. **Delmonico Hotel Co.**, 92 INA 324 (Jul. 20, 1993); **Phototypes, Inc.**, 90 INA 063 (May 22, 1991). For example, the Board held in **Gambino's Restaurant**, 90 INA 320 (Sep. 17, 1991), that the employer should have attempted to contact the job applicant by Certified Mail when the applicant failed to respond to the telephone message. The reason is that the employer has the burden to document its attempts to contact U. S. applicants and to explain why alternative methods were not used. **Gail (Galil) Locksmith**, 99 INA 143 (Jun. 1999).

method apparently were attempted after the applicant's resume was received.

Accordingly, the following order affirming the CO's denial of certification will issue.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 179
M & I AUTOMOTIVE, INC., Employer,
ZBIGNIEW DROZAK, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis	10/21/99		
Huddleston	8/3/99		

Thank you,

Judge Neusner

Date: July 8, 1999